

Second, permitting stations to surrender either right not only would confuse copyright and communications law and obliterate the distinction drawn sharply by Congress, but also effectively would write the new law out of existence. Indeed, retransmission consent was a dismal flop in the late sixties precisely because the rights of copyright owners *vis-a-vis* their programming were not segregated from the rights of stations with respect to their signals. At that time, cable systems incurred no copyright liability for retransmission of broadcast programming. Program copyright owners, as well as parties holding underlying rights (*e.g.*, music) were permitted to control the ultimate decision concerning retransmission consent.²⁶ However, program copyright owners simply were unwilling to grant appropriate consent on a widespread or consistent basis.²⁷ Consequently, cable systems were unable to secure retransmission consent to programming on a consistent basis, and the concept was abandoned.

The same result is predictable under Section 325(b) unless stations' statutory rights to elect, grant, and/or withhold retransmission consent is considered inalienable and beyond the reach of program suppliers who might wish to exploit it as a means of gaining rights or leverage not otherwise available to them under law. If parties with whom broadcast licensees contract for programming can usurp the licensee's statutory rights, then the new retransmission consent option will be illusory. Any broadcast licensee wishing to elect retransmission consent and authorize cable systems to carry its station's signal will stand to be "held up" by any network or program producer the station is dealing with. Some already have attempted to do so, as evidenced by the contract language recently proffered to

²⁶Under the Commission's proposal and experiment, cable systems had to secure retransmission consent from originating stations on a program-by-program basis. *Cable Television Report and Order*, 36 FCC 2d 143, 148.

²⁷*Id.*

stations.²⁸ Even a few isolated instances of refusal to permit stations to grant retransmission consent (accomplished via a program license contract) would disrupt and destroy the retransmission consent regime Congress has established. The Commission, therefore, must not leave a void of interpretation which would open the door to defeat its intended operation and purpose.

The same is true of networks who clearly were not the intended beneficiaries of the retransmission consent right. Networks ought not be permitted to impose retransmission consent decisions or influence such decisions by stations via adjustments in network compensation.

Therefore, INTV urges the Commission to declare the right to elect either must carry or retransmission consent, as well as the right to grant or withhold retransmission consent personal and exclusive to broadcast station licensees. No right has been conferred on networks or program copyright owners as such by the retransmission consent provision. They should not be permitted to hamstring broadcast licensees in the exercise of the licensee's rights regarding retransmission consent. This would confer power over and above that already granted them under the copyright law, something Congress sought explicitly to avoid.

16. A LOCAL SIGNAL CARRIED PURSUANT TO RETRANSMISSION CONSENT MUST BE CARRIED IN ITS ENTIRETY.

The Commission must require complete carriage (*i.e.*, no "cherry picking") of *local* signals carried pursuant to retransmission consent. First, the conflicting language of Sections 325(b)(4) and 614(b)(4), acknowledged by the Commission, requires the Commission to make a reasonable interpretation based on the purpose of the statute. Second, the Commission is correct in concluding that local signals carried pursuant to retransmission consent may be counted against the local signal

²⁸See Comments of Tribune Broadcasting Company, MM Docket No. 92-259 (filed January 4, 1993) Exhibit A.

cap applicable to must carry stations.²⁹ Third, if a station is to be counted against the cap, it ought be carried in its entirety, as required of must carry signals under Section 614(b)(4). Therefore, because local signals carried pursuant to retransmission consent are to be included under the cap, they should be carried in their entirety.

Sound public policy considerations also dictate this requirement. Piecemeal signal carriage confuses and frustrates viewers. Moreover, it undermines the table of allotments, which was designed to maximize service and competition. The Commission, for example, long has required stations to maintain minimum operating schedules. Partial carriage fails to fulfill these basic goals, and, therefore, should not be permitted.

17. ALTHOUGH RETRANSMISSION CONSENT CONTRACTS BETWEEN CABLE SYSTEMS AND BROADCAST LICENSEES PROPERLY ARE MATTERS FOR LOCAL COURTS, THE COMMISSION STILL SHOULD IMPOSE SANCTIONS FOR UNAUTHORIZED CARRIAGE OF A BROADCAST STATION SIGNAL.

A cable system which carries a broadcast station signal, other than a station which has elected must carry status, without consent of the station would be indirect violation of §325 of the Act. The Commission could and should impose sanctions on a cable system that so violated the law.

18. MUST CARRY AND CHANNEL POSITIONING RULES SHOULD BECOME EFFECTIVE IMMEDIATELY WITH FULL COMPLIANCE REQUIRED WITHIN 45 DAYS.

The must carry rules should be made effective immediately. Once a station elects must carry status, a cable system should be required to carry the signal on the channel position requested by the station.³⁰ INTV recognizes that some cable systems

²⁹Notice at ¶61.

³⁰Cable systems may continue to carry any and all signals now carried until October 6, 1993. Only as of October 6, 1993, will cable systems be prohibited from carrying signals which have neither elected must carry or authorized the system to carry the signal pursuant to retransmission consent.

might have to adjust their channel line-up. Therefore, a 45 day delay is appropriate to permit the cable system to come into compliance.

19. STATIONS SHOULD BE PERMITTED TO MAKE THEIR INITIAL ELECTION AT ANY TIME PRIOR TO OCTOBER 6, 1993.

INTV urges flexibility in this first election. Much remains uncertain, and stations should have as complete a view of the landscape as possible before making their election. The election will govern their relationship with local cable systems for three years. Mistakes would be costly. Therefore, INTV urges the Commission to allow the maximum decision time permitted by the statute.

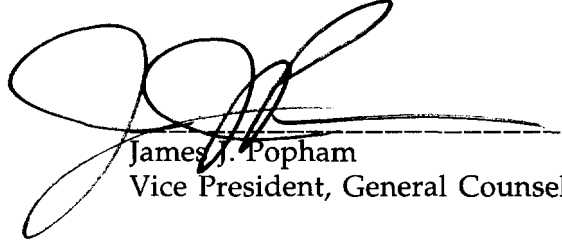
20. THE COMMISSION SHOULD LEAVE THIS PROCEEDING OPEN FOR THREE YEARS TO PERMIT ADJUSTMENTS BASED ON EXPERIENCE UNDER THE NEW LAW.

As INTV has noted, more will be learned via experience than by exhaustive -- and exhausting -- pondering over countless hypothetical circumstances. To permit experiences to be brought to light and considered, this proceeding should remain open. As more is learned, further notices could be adopted looking toward appropriate modification, expansion, or deletion of rules.

INTV has urged the Commission to maintain its focus on the forest while tending the many individual trees therein. If the Commission waters the trees excessively it will create a swamp. Swamps often are pretty to look at. The Commission might well create a swamp, which on paper looks terrific, even inviting. Swamps, however, are characterized by mud, slime, mosquitos, alligators, snakes, fungus, frogs (🐸), and algae -- and lots and lots of water. Slogging around in a swamp is no fun. It is difficult, dangerous, and downright disgusting at times.

Therefore, INTV urges the Commission to take a judicious, even cautious approach, to fine-tuning the new must carry and retransmission consent requirements.

Respectfully submitted,



James J. Popham
Vice President, General Counsel

Association of Independent
Television Stations, Inc.
1200 18th Street, N.W.
Suite 502
Washington, D.C. 20036
(202) 887-1970

January 4, 1993

EXHIBIT 1

Colorado—Denver



KLZ-TV



Ch. 7

Technical Facilities: Channel No. 7
(174-180 mc). Authorized power:
316-kw visual, 158-kw aural. An-
tenna: 1010-ft. above av. terrain,
285-ft. above ground, 7695-ft.
above sea level.

Latitude 39° 43' 46"
Longitude 105° 14' 12"

Transmitter: Buffalo Bill Hwy., Look-
out Mt.

Studio: 131 Speer Blvd.

TV tape: Recording facilities.

Color: Network, film, slide.

News Wire Service: UPI.

Facsimile Service: UPI.

AM Affiliate: KLZ, 5-kw, 560 kc
(CBS).

Telephone: 623-4271.

TWX No.: 303-292-0268.

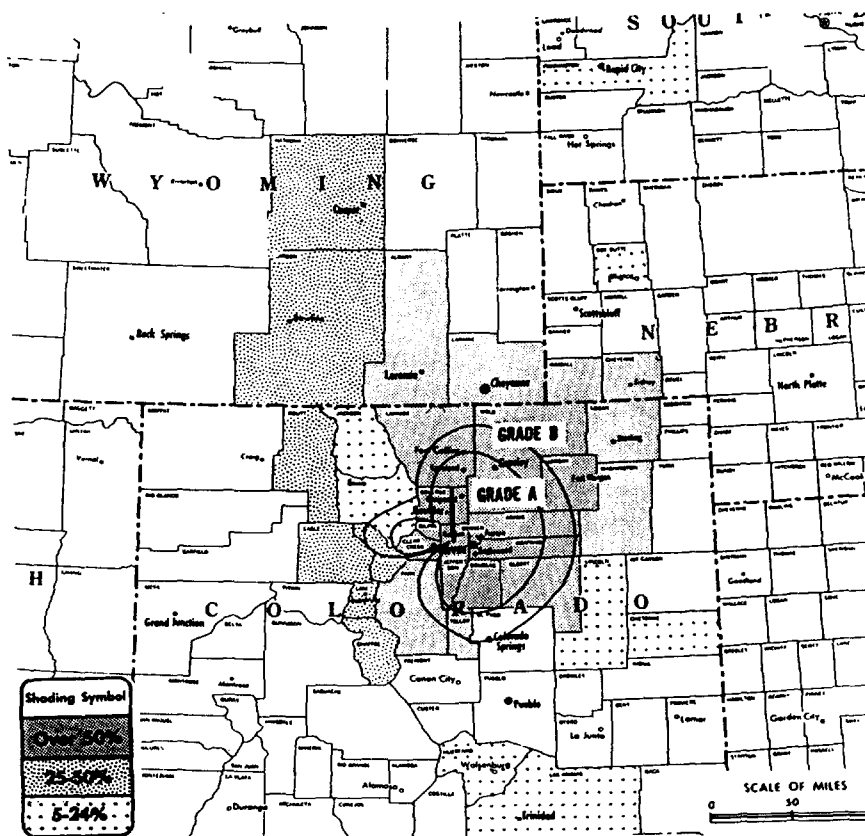
Represented (engineering) by Jansky
& Bailey.

Total Households: © SRDS

Consumer Market Data as of 9/1/64.

TV Homes: TV% and Net Weekly Circulation
© 1964 American Research Bureau.

County coverage (shaded areas) based on 1960
ARB study.



KLZ-TV Ref: FCC File No. BNPCT-1362 Granted 9/15/63

©American Map Co., Inc., N.Y., No. 14:

KLZ-TV

Licensee: Time-Life Broadcast Inc., 131 Speer Blvd.

Ownership: TLF Broadcasters Inc. (wholly-owned by Time Inc.),
100%. For other interests, see Time under Group Ownership.

Began Operation: Nov. 1, 1953. Sale to Time Inc. by Aladdin Radio
& TV approved by FCC June 23, 1954 (Television Digest, Vol.
10:11, 15, 25, 26).

Represented (sales) by The Katz Agency Inc.

Represented (legal) by Pierson, Ball & Dowd.

Personnel:

HUGH B. TERRY, president & general manager.

PAUL BLUE, asst. to pres. & film buyer.

JACK TIPTON, manager & director of sales.

BOB HART, local sales manager.

MERWIN SMITH, program manager.

JOHN CONNORS, promotion & publicity director.

RUTH WILLHIDE, traffic manager.

STARR YELLAND, sports & special projects director.

EUGENE JENKINS, chief engineer.

DIGEST OF RATE CARD NO. P13—(July 1, 1964)

Hour	30 Min.	15 Min.	Min.	20 Sec.	10 Sec.
Class A—6-10:30 p.m., daily.					
\$900.00	\$480.00	\$340.00	\$300.00*	\$275.00*	\$138.00*

*Class AA—6:30-9 p.m., daily.

NETWORK BASE HOURLY RATE: \$1000.

Net Weekly Circulation	State County	Total Households	TV Homes	%
Over 50%	COLORADO			
	Adams	41,000	39,600	97
	Arapahoe	39,500	37,600	95
	Boulder	26,300	23,400	89

Net Weekly Circulation	State County	Total Households	TV Homes
Over 50%	COLORADO—(Continued)		
	Clear Creek	900	800
	Denver	182,500	166,000
	Douglas	1,800	1,700
	Elbert	1,000	800
	Gilpin	300	200
	Jefferson	47,600	45,700
	Larimer	19,000	17,200
	Logan	6,700	5,700
	Morgan	7,000	6,500
	Park	500	400
	Teller	800	700
	Washington	1,800	1,500
	Weld	23,300	21,500
	NEBRASKA		
	Cheyenne	4,900	4,300
	Kimball	2,800	2,700
Between 25-50%	WYOMING		
	Albany	7,100	5,700
	Laramie	20,900	19,200
	COLORADO		
	Chaffee	2,900	2,300
	Eagle	1,400	1,100
	Lake	2,200	1,800
	Routt	1,500	1,100
	Summit	800	600
	WYOMING		
	Carbon	4,800	3,800
	Natrona	18,500	16,700
Between 5-24%	COLORADO: Cheyenne, Grand, Huerfano, Jackson, Las Animas, Lincoln, NEBRASKA: Box Butte. SOUTH DAKOTA: Pennington		
	KLZ-TV Station Total	503,400	459,600
ARB Total Net Weekly Circulation (March, 1964)			372,300

Utah—Salt Lake City

1965 TV FACTBOOK



KCPX-TV



Ch. 4

Technical Facilities: Channel No. 4
(66-72 mc). Authorized power:
27.15-kw visual, 14.5-kw aural.
Antenna: 3030-ft. above av. ter-
rain, 186-ft. above ground, 8684-
ft. above sea level.

Latitude 40° 36' 30.5"

Longitude 112° 09' 34"

Transmitter: Mt. Vision.

Studio: 130 Social Hall Ave.

TV tape: Recording facilities.

AM Affiliate: KCPX, 5-kw, 1320 kc
(NBC). FM Affiliate: KCPX-FM,
1.2-kw, 98.7 mc (No. 254), 2970-
ft. antenna height.

Color: Network only.

News Wire Service: UPI.

Facsimile Service: UPI.

News Film Service: UPI.

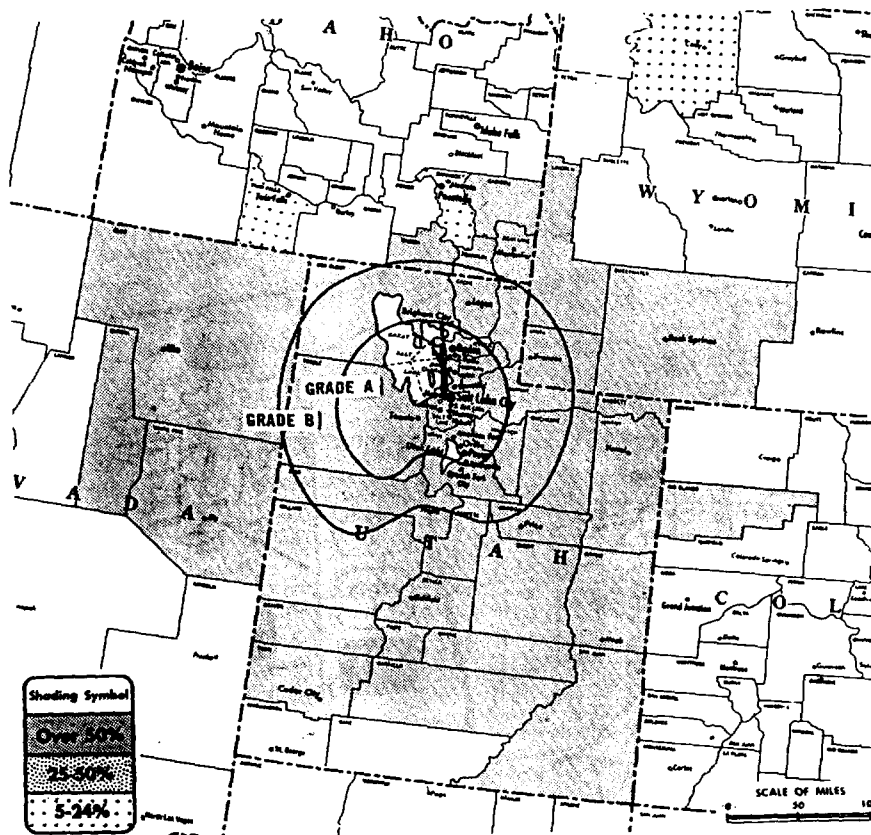
Total Households: © SRDS

Consumer Market Data as of 9/1/64.

TV Homes: TV% and Net Weekly Circulation

© 1964 American Research Bureau.

County coverage (shaded areas) based on 1962
and 1963 ARB studies.



KCPX-TV Ref: FCC File No. BNPCT-1172 Granted 7/22/63

©American Map Co., Inc., N.Y., No. 14244

KCPX-TV

Licensee: Screen Gems Broadcasting Corp., 130 Social Hall Ave.,
Salt Lake City 11.

Telephone: Davis 2-5681. TWX No.: 801-521-2365.

Ownership: Screen Gems Inc., 100%. Screen Gems owns WAPA-TV,
San Juan, P.R., which in turn owns 1/3 of WOLE-TV, Aguadilla,
P.R. Note: Transfer from Columbia Pictures to Screen Gems Inc.
approved Jan. 23, 1963 by FCC (Addenda 32-NNNN).

Began Operation: July 1, 1948. Sale to present owners by TLF
Bcstrs. Inc. (Time Inc.) approved Nov. 5, 1959 by FCC (Tele-
vision Digest, Vol. 15:30, 45). Sale to Time Inc. by Intermountain
Bcstg. & Television Corp. (S. S. Fox, et al.) approved by FCC
June 24, 1953 (Vol. 9:14, 26).

Represented (sales) by The Katz Agency Inc.

Represented (legal) by Fletcher, Heald, Rowell, Kenenhan & Hildreth.

Represented (engineering) by Hammett & Edison.

Personnel:

DOUGLAS ELLESON, manager.

HACK WOOLLEY, sales manager.

EMIL LOSKOT, business manager.

GEORGE SMITH, promotion director.

JOHN LAUBER, art director.

DAN RAINGER, program director, film supervisor & buyer.

WALLY LAMBOURNE, director of engineering.

ROY GIBSON, news & special events director.

DIGEST OF RATE CARD NO. A21—(June 1, 1964)

Hour	30 Min.	15 Min.	10 Min.	Min. or 20 Sec.	10 Sec.
Class AA—7-10:30 p.m., daily.					
\$760.00	\$380.00	\$280.00	\$260.00	\$200.00*	\$100.00*

*Class AA—7-10 p.m., daily.

NETWORK BASE HOURLY RATE: \$800.

Net Weekly Circulation	State County	Total Households	TV Homes	%
Over 50%	COLORADO			
	Rio Blanco	1,700	1,400	84
	IDAHO: Bear Lake	2,000	1,800	87
	Caribou	1,700	1,400	87

Net Weekly Circulation	State County	Total Households	TV Homes	%
Over 50% (Continued)	IDAHO (Continued)			
	Franklin	2,100	1,800	89
	Oneida	1,100	1,000	91
	MONTANA			
	Beaverhead	2,400	1,800	73
	Fergus	4,300	3,300	77
	Park	4,700	3,900	84
	NEVADA			
	Elko	3,800	2,600	69
	Eureka	300	200	56
	White Pine	3,000	2,500	84
	UTAH			
	Beaver	1,100	1,000	88
	Box Elder	7,500	7,100	95
	Cache	10,700	9,500	89
	Carbon	5,700	5,000	89
	Daggett	400	300	66
	Davis	18,500	17,700	96
	Duchesne	1,600	1,300	82
	Emery	1,400	1,200	90
	Garfield	800	500	65
	Grand	2,400	1,500	66
	Iron	3,200	2,400	75
	Juab	1,100	1,000	90
	Millard	1,900	1,600	89
	Morgan	700	600	87
	Piute	200	200	84
	Rich	500	400	83
	Salt Lake	126,600	118,500	94
	San Juan	2,500	1,700	66
	Sanpete	3,100	2,800	89
	Sevier	3,000	2,700	92
	Summit	1,500	1,400	92
	Tooele	5,300	5,000	95
	Uintah	3,200	2,700	84
	Utah	29,900	27,500	92
	Wasatch	1,500	1,300	86
	Wayne	500	400	91

(Continued on page 663-b)

KCPX-TV Station Total	372,700	334,300	90
ARB Total Net Weekly Circulation (March, 1964)		270,600	

EXHIBIT 2

**Before the
Federal Communications Commission
Washington, D.C.**

RM-7613

In the matter of

Amendment of the Commission's Rules
Regarding Determinations of Significantly
Viewed Status for Television Stations

STATEMENT IN SUPPORT OF PETITION FOR RULE MAKING

The Association of Independent Television Stations, Inc. ("INTV"), by its counsel, hereby submits its statement in support of the Petition for Rulemaking ("Petition") filed December 19, 1990, by Malrite Communications Group, Inc. ("Malrite"), thereby giving rise to the above-captioned proceeding.¹

Malrite has urged the Commission to commence a rulemaking proceeding looking toward modification of Section 76.54 of the Commission's rules. Malrite requests that the rule be amended to permit all television stations to demonstrate that they are "significantly viewed" based on county-wide rather than community-wide audience data.

¹*Public Notice*, "Petitions for Rulemaking Filed," Report No. 1836, Mimeo number 11665 (February 7, 1991).

INTV urges grant of Malrite's Petition and commencement of rule making to consider amending the Commission's rules as proposed by Malrite.

According to Malrite, cable penetration has increased to the point that finding a sufficient number of non-cable households in a community from which derive a valid sample of viewing has become difficult or impossible. Consequently, many stations, especially older UHF stations, have found it impossible to establish that they were significantly viewed in many cable communities.

This inability to demonstrate significant viewing frustrates the desire of the station to be carried, the desire of a cable system to carry the station, and the desire of local cable subscribers for access to the station's signal. Because the station cannot demonstrate significant viewing, its signal technically remains a distant signal which may be carried by the cable operator only upon payment of royalties under the cable compulsory license. Cable operators often are unwilling to bear the additional copyright license fees for carriage of the station. Therefore, the station is not carried, and everyone -- the station, the cable system, and the public -- is a loser.

INTV concurs with Malrite's assessment of the difficulty facing many existing UHF independent stations in securing cable carriage on systems within their service areas (but

beyond their 35-mile carriage zones under the Commission's defunct signal carriage rules). Therefore, in further support of Malrite's Petition, INTV submits the following:

Use of county-wide data in the circumstances described by Malrite would be appropriate and consistent with the Commission's reliance on county-wide data in most other circumstances. As the Commission has observed:

The Commission's current approach to determining significant viewing generally relies upon statistics that are collected on a county-by-county basis reflecting the percentage of off-the-air viewers in a given area able to view and actually watching a given channel.²

The Commission has used or permitted use of county rather than community data in circumstances where (1) community data was unavailable; (2) county data provided certainty; and/or (3) more refined tests would have been extremely costly.³ Thus, the Commission chose to use county-wide rather than community data for determining (1) the initial list of significantly-viewed signals in 1972;⁴ (2) whether new stations were significantly-viewed;⁵ (3) whether local signals were

²*Further Notice of Proposed Rule Making*, 2 FCC Rcd 5888, 5892, n.23 (1987).

³*Scranton Broadcasters, Inc.*, 88 FCC 2d 1482, 1489 (1982); *Network Program Exclusivity*, 68 FCC 2d 1461, 1467 (1978).

⁴*Cable Television Report and Order*, 36 FCC 2d 141, 175-176 (1972); *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 345-346 (1972).

⁵*Id.*

available for purposes of triggering the A-B switch and consumer education requirements;⁶ (4) whether station signals were subject to deletion under the network non-duplication rules;⁷ and (5) whether stations were "qualified" stations under the 1986 version of the Commission's ill-fated "must carry" rules.⁸

Now every reason exists to apply the same standard in the case of existing stations' seeking significantly viewed status. Community-by-community data has been considered necessary only when determining whether effective competition exists and whether existing stations are significantly viewed.⁹ In the case of effective competition, the Commission was bound by a statutory mandate to make determinations on a community-by-community basis.¹⁰ No such mandate exists with respect to application of the standard to existing stations.

⁶*Carriage of Television Broadcast Signals*, 2 FCC Rcd 3593, 3606 (1987).

⁷*Network Program Exclusivity Rules*, 67 FCC 2d 1303 (1978).

⁸*Carriage of Television Broadcast Signals*, 1 FCC Rcd 864, 887 (1986).

⁹47 CFR Sec. 76.33(a)(2); 47 CFR Sec. 76.54(d).

¹⁰*Cable Act Implementation*, 3 FCC Rcd 2617, 2620 (1988). Even then the Commission initially had determined to utilize county-wide data. See *Further Notice of Proposed Rule Making*, 2 FCC Rcd 5888 (1987).

Furthermore, the precision of community-based surveys hardly appears warranted in the case of existing stations' seeking significantly viewed status. A successful effort to demonstrate significantly-viewed status would impose no burden on any entity. No new rights or obligations would be created. The station simply would be considered local for copyright purposes. Cable systems could carry the signal or not, as they wished.¹¹ A major impediment to their carriage, however, would have been removed. Such a broad, less-precise effect, therefore, only would enhance the potential for carriage at no cost to anyone.

On the other hand, unnecessary costs to stations and cable systems would be eliminated. The Commission always has acknowledged the considerably more burdensome and costly nature of community-by-community surveys.¹² Now, as Malrite points out, cost no longer is the only concern. Selecting a

¹¹INTV, of course, considers the lack of local signal carriage requirements a severe gap in the current scheme of cable regulation.

¹²As noted by the Commission:
[W]e...recognize that measurement of viewing on a community basis may require special studies and thereby be more costly and less convenient than measurement on a county basis, which can be obtained from the nationwide county audience studies prepared by professional audience research firms.

Further Notice of Proposed Rule Making, supra, 2 FCC Rcd at 5889; *see also Implementation of Cable Act, supra*, 3 FCC Rcd at 2629, n.23. Indeed, some stations find it more cost-effective to operate low-power translators to assure carriage than to attempt to demonstrate significant viewing in a limited number of off-air households.

representative sample of sufficient size has become difficult and even impossible in some cases. As Malrite correctly observes, nearly 60% of the nation's television households are cable households. The universe of non-cable households has decreased significantly since 1972. The ability to select a valid sample of non-cable households for purposes of showing significant viewing necessarily becomes increasingly diminished as the universe of non-cable homes decreases.

Moreover, even if adequate samples can be found, small samples raise higher hurdles to successful demonstrations that a station is significantly viewed. As sample size decreases, the more difficult it is for a station to satisfy the Commission's survey standards. The Commission requires that a station's share and net weekly circulation, as measured in the survey sample, exceed the required level by one standard error.¹³ As sample size decreases, the standard error increases.¹⁴ For example, independent station WXIX-TV was able to demonstrate that it was significantly viewed in several cable communities by a survey of 262 households showing that the station received an estimated 4.0% share of audience and a 14.6% estimated net weekly circulation.¹⁵ However, if WXIX

¹³47 CFR Sec. 76.54(b).

¹⁴*See, e.g., Desert Empire Television Corporation*, 86 FCC 2d 644, 649 (1981).

¹⁵*Clearview Cable TV*, 71 FCC 2d 1133, 1136, n.8 (1979).

had been limited to a sample of 87 homes, its showing would have been inadequate. The standard error would have been 2.1 (as opposed to 1.2). Therefore, a 4.1 share would have been required to satisfy the Commission's criteria of a result one standard error above the required share. With a sample size of 45, which INTV understands to be the minimum sample size considered reliable by at least one ratings service, the standard error would have been 2.9, thereby requiring a 4.9 estimated share to satisfy the nominally 2% standard.¹⁶ Therefore, even if small samples can be found, they create impediments to successful showings.

The lack of availability of data and the high cost of compiling it have provided the basis for Commission decisions to permit use of county-by-county rather than community audience data. These factors, as well as the lack of any cost or burden created by according significantly viewed status to a station, underscore the soundness of Malrite's proposal.

¹⁶The Commission also has accepted samples of this magnitude. *Desert Empire Television Corporation, supra*, 86 FCC 2d at 649.

In view of the above, INTV support's Malrite's proposal and joins with Malrite in urging prompt initiation of rule making to amend the Commission's rules accordingly.

Respectfully submitted,

James J. Popham, Esquire
Vice President, General Counsel

**Association of Independent
Television Stations, Inc.**

1200 18th. Street, N.W.
Washington, D.C. 20036
(202) 887-1970

March 11, 1991

Certificate of Service

I, James J. Popham, hereby certify that I have served counsel listed below with a copy of the forgoing "Statement in Support of Petition for Rulemaking," via First-class mail, postage pre-paid, on this 11th day of March, 1991:

Irving Gastfreund
Kaye, Scholer, Fierman, Hays & Handler
901 Fifteenth Street, N.W.
Suite 1100
Washington, D.C. 20005
